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RE YAP YING LONG, EX P FCJ SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR
ABDUL AZIZ MOHAMAD J
[BANKRUPTCY NO: D2-29-947-1998]
b 20 DECEMBER 1999

BANKRUPTCY: *Creditor's Petition - Reinstatement of - Whether reinstatement procedure available in bankruptcy proceedings*

c The SAR struck out the creditor's petition because on the day fixed for its hearing, neither the judgment creditor nor the judgment debtor was present. The judgment creditor then applied for the creditor's petition to be reinstated. The judgment debtor consented to the application and the court reinstated the creditor's petition. However, about two months later, the judgment debtor applied for the striking out of the reinstated creditor's d petition on the ground that the procedure of reinstatement was not available in bankruptcy proceedings. The application was dismissed by the court. The judgment debtor appealed.

Held:

e **[1]** The application for reinstatement in this case was in order and since the judgment debtor did not object to it, the reinstatement is incapable of being questioned.

[2] If the judgment debtor had been given an opportunity to be heard on f the question of reinstatement and the reinstatement was allowed, that would amount to giving leave and thus the purpose behind r. 120 of the Bankruptcy Rules 1969 would have been served.

[3] There is an absence of a rule in the Bankruptcy Rules 1969 on the question of reinstatement of a bankruptcy petition. Therefore r. 276 of g the Bankruptcy Rules 1969 applies to render applicable O. 32 r. 5(4) Rules of the High Court 1980.

[Appeal dismissed.]

Case(s) referred to:
h *Mariam Sasiman v. BBMB Factoring Berhad [1999] 5 CLJ Supp 294* ***(not foll)***

Legislation referred to:
Bankruptcy Rules 1969, rr. 120, 276
Rules of the High Court 1980, O. 32 r. 5(4)

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For the judgment debtor/appellant - N Sivananthan; M/s Sivananthan
For the judgment creditor/respondent - Daniel Siew (AG Tan with him); M/s Shui-Tai

Reported by Izzaty Izzuddin

JUDGMENT

Abdul Aziz Mohamad J:

The creditor's petition in this case was issued on 11 September 1998. It gave 12 November 1998 as the date of hearing. On that date the judgment creditor was absent. The judgment debtor had not been served with the petition and was also absent. Because the judgment creditor was absent, the Senior Assistant Registrar struck out the creditor's petition.

On 6 April 1999, on the application of the judgment creditor – the judgment debtor, who was represented by solicitors, not objecting – the creditor's petition was reinstated. What actually happened on that day was that counsel for the judgment creditor appeared also on behalf of the judgment debtor's solicitors and said that the judgment debtor's solicitors did not object to the application.

On 10 June 1999 the judgment debtor applied for the striking out of the reinstated creditor's petition. That application was heard together with the creditor's petition. The Senior Assistant Registrar dismissed the judgment debtor's striking-out application and allowed the creditor's petition. The judgment debtor now appeals.

The question in this appeal is whether the creditor's petition should have been struck out.

The ground for striking out that has been relied on by the judgment debtor is one that depends on r. 120 of the Bankruptcy Rules 1969. As far as material, that rule says:

> If any creditor neglects to appear on his petition no subsequent petition against the same debtor ... shall be presented by the same creditor in respect of the same act of bankruptcy without the leave of the court.

Based on that rule, learned counsel for the judgment debtor submitted that after the creditor's petition had been struck out on 12 November 1998 for the non-appearance of the judgment creditor, the only step that the judgment creditor could take to proceed further against the judgment debtor was to present a fresh petition with the leave of the court. Learned counsel for the judgment debtor also submitted that the procedure for reinstatement

was not available in bankruptcy proceedings. The entire submission was prompted by the judgment of Faiza Tamby Chik J in *Mariam bt Sasiman v. BBMB Factoring Berhad* [1999] 5 CLJ Supp 294; [1999] 2 AMR 1664, which was delivered on 5 October 1998 but had not yet been published, and therefore was not within the knowledge of the judgment debtor's solicitors, when the judgment debtor's solicitors consented to the reinstatement of the creditor's petition in this case.

In that case, the creditor's petition was dismissed because on the date of hearing the judgment creditor was absent. The judgment debtor was present, the petition having been served. The judgment creditor subsequently applied for reinstatement of the petition. The judgment debtor objected to reinstatement, relying on r. 120. The objection was upheld by the learned judge on appeal.

Relying on that case, learned counsel for the judgment debtor here submitted that the Senior Assistant Registrar had no jurisdiction to allow the reinstatement of the petition and that the judgment debtor's consent was immaterial because consent could not confer jurisdiction where there was none. I have to say that in that case the learned judge did not use the word "jurisdiction". The word was used only by the reporter. See, in the headnote, para. 2 under "Issue(s)" and para. 2 under "Held".

In my opinion, r. 120 is specifically directed at the circumstance of a creditor presenting a subsequent petition after having neglected to appear on his original petition and after the original petition was either dismissed or struck out – the rule, strangely, does not state the consequence – as a result of the non-appearance. It does not say that presenting another petition is the only course open to the creditor. It ought not to be inferred that it intends to say so. Its purpose is to bar the presentation of the subsequent petition without the leave of the court. The thinking behind the rule presumably is that, in such a case, the creditor should not be allowed a second chance to proceed against the debtor without the latter being given an opportunity to show that the creditor should not be allowed a second chance.

The terms of r. 120 are such that it is not designed to answer the question, "Can a creditor apply instead for reinstatement of his petition which has been struck out because of his absence?". As I said, the rule does not say that the only course open to the creditor is to present another petition. Apart from the reliance on r. 120, it has not been argued why the procedure of reinstatement should not be available for a bankruptcy petition. It is important to bear in mind that if reinstatement was allowed, as it was in

this case, that would amount to giving leave, and if the judgment debtor had been given a say on the question of reinstatement, the purpose behind r. 120 would have been served. Because r. 120 is not designed to answer the question, and the question is not answered elsewhere in the Bankruptcy Rules 1969, there is an absence of a rule on the question of reinstatement of a bankruptcy petition. Because of that – and here I respectfully differ with Faiza Tamby Chik J – r. 276 of the Bankruptcy Rules 1969 applies to render applicable O. 32 r. 5(4) of the Rules of the High Court 1980, which provides for the restoration to the list of an application by summons that has been dismissed without a hearing for the applicant's failure to attend the hearing. The application for reinstatement in this case was therefore in order and, the judgment debtor not objecting, the reinstatement is not capable of being questioned.

Alternatively, the question of reinstatement being a question of mere procedure as to which there is a lacuna in the Bankruptcy Rules 1969, I think parties are at liberty to agree to the procedure of reinstatement. The judgment debtor in this case, by not objecting to the application for reinstatement, has agreed to the procedure of reinstatement and to the reinstatement itself. The reinstatement does not violate the principle behind r. 120. Neither has it caused injustice to the judgment debtor. Look at it this way. Although the decision in *Mariam bt Sasiman* was not known to the judgment debtor's solicitors when the reinstatement was consented to, they would have known of the existence of r. 120 and of its thinking of the presentation of a subsequent petition. If they thought that there was some advantage to be gained by the judgment debtor if the judgment creditor were to attempt to present another petition instead of applying, as they did, for reinstatement, they, the judgment debtor's solicitors, should have resisted the reinstatement and insisted on the judgment creditor applying for leave to present a fresh petition. But after considering the affidavit in support of the application for reinstatement, and the reasons given therein for the absence of the judgment creditor on the hearing of the petition, they must have decided that, now that the actual circumstances were known, the petition did not deserve to be struck out in the first place; and that must have been why they did not object to the reinstatement and give some reason why, if the judgment creditor had instead sought leave to present a fresh petition, leave would not have been granted. It must be assumed that to the solicitors for the judgment debtor, after taking into account the judgment creditor's explanation and the terms of r. 120, reinstatement was fair and just. The judgment debtor cannot now say that the petition ought to have been and to be struck out because, on jurisdictional grounds, it ought not to have been reinstated in the first place.

I dismiss the appeal with costs.